

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4021

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802,
AMERICAN FEDERATION OF MUSICIANS, AFL-CIO,

Respondent.

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P/S

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

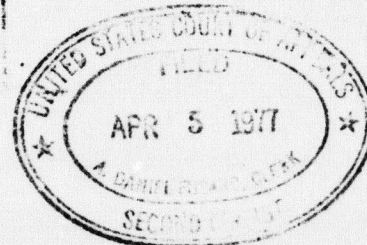
**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF THE ISSUE PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that Local 802 violated Section 8(e) of the Act by maintaining and enforcing agreements, arrangements, or understandings with Vogue Restaurant, Inc., and Huntington Town House, Inc. under which only Local 802 band leaders would be allowed to perform on their premises.

2. Whether substantial evidence on the record as a whole supports the Board's finding that Local 802 violated Section 8(b)(4)(ii) (B) of the Act by threatening, coercing, and restraining the Queens Center Merchants Association, Inc., with an object of forcing or requiring the Association and other persons to cease doing business with Bob Chevy, a non-union band leader.

3. Whether the Board's broad order was a proper remedy in this case.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), for enforcement of its order issued against Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO (hereafter "the Union" or "Local 802") on June 30, 1976.^{1/} The Board's Decision and Order are reported at 225 NLRB No. 74 (A. 2-40).^{2/} This Court has jurisdiction of the proceedings because

^{1/} Separate formal settlement stipulations were signed by Huntington Town House, Inc. and Vogue Restaurant, Inc. severing these respondents from the case to the extent that such employers were involved in the violations of Section 8(e) of the Act. Thus, neither Huntington nor Vogue opposes enforcement of this order (A. 3-4, n. 7; Tr. 6, 7).

^{2/} "A." references are to pages of the printed appendix. "Tr." references are to the transcript of the Board's proceedings filed with the Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

the unfair labor practices took place in Huntington Station and Queens, New York.

I. THE BOARD'S FINDINGS OF FACT

A. Local 802 Enforces its Hot Cargo Agreement With Vogue Restaurant

Vogue Restaurant is located in the Skyway Hotel in Queens, New York (A. 15; Tr. 197-198, 236-237). Its principal owners, Sy and Henry Cohen, regularly employ musicians to perform for the customers (Ibid.). Jeff and Phil, a musical duo,^{3/} were referred to an engagement at Vogue beginning March 12, 1975,^{4/} by the Carnegie Talent Agency (A. 16; Tr. 63). After their first performance on March 12, Sy Cohen told Jeff and Phil that the audience liked them very much and that they would be performing at Vogue for a long time (A. 16; Tr. 64).

On about March 15, Cohen asked Jeff and Phil if they were members of Local 802 and explained to them that a new, very determined union delegate had started to come around (A. 16; Tr. 65, 78-79). Jeff and Phil admitted they were not members and told Cohen it was their understanding that they didn't have to be members of any union to work anywhere (A. 16; Tr. 65, 79). In response Cohen remarked, "[T]his is a Union house" (A. 16 n. 35; Tr. 79) and he stated "[T]o play here, you have to be a member of Local 802." (A. 16; Tr. 66). He also said that the Union delegate would tell them what to do when he came around (A. 16; Tr. 65-66, 79).

^{3/} Jeff and Phil are the professional names of Jeffrey Tillman and Helier Felipe (A. 15 n. 32; Tr. 62-63, 77-78).

^{4/} All dates are 1975 unless otherwise indicated.

On the evening of April 5, Jeff and Phil were introduced to Local 802 representative Ray Cole (A. 16; Tr. 14, 66-67, 79). Then, in the presence of Sy Cohen, Cole asked Jeff and Phil if they were members of the Union (A. 16; Tr. 68, 80). When Jeff and Phil responded by showing their membership cards in the Allied Musicians' Union ("A.M.U."), Cole stated to Cohen that he "had to advise him that [Jeff and Phil] were not members of Local 802." (A. 16; Tr. 68-69, 80.) Cole then disparaged Del Castile, the administrator of the A.M.U., called the A.M.U. a "bastard union", and told them if they wanted to advance their careers and play at the better rooms, they would have to join Local 802 (A. 16; Tr. 68-69, 80-81). After explaining to Sy Cohen that the A.M.U. was the only union they needed, Jeff and Phil finished the night's performance (A. 17; Tr. 82). This was the last time they appeared at Vogue (A. 17; Tr. 83).

On April 7, Sy Cohen called Arnold Klein, president of Carnegie Talent Agency, and told him that the union delegate had visited Vogue and that because of Jeff and Phil's non-membership in Local 802, he might have to let them go (A. 17; Tr. 37-38, 40). Cohen disclosed that he had an agreement with Local 802 whereby only its musicians could work at Vogue and that there was a possibility of picketing if Jeff and Phil were not taken off the job (A. 17; Tr. 41-42). He also stated that he would like to keep Jeff and Phil on for about four weeks or so, if it were all right with the Union and if they became members of Local 802 (A. 17; Tr. 43). After this conversation, Klein instructed his executive assistant Francine Flashner to call Jeff and Phil to ascertain their union status (A. 17; Tr. 43-44).

At about 1:30 p.m., Flashner notified Jeff that he and Phil had to be members of Local 802 to continue working at Vogue. Flashner indicated that Sy Cohen wanted to know if they would join the Union, and she gave Jeff 15 minutes to agree to join the Union or lose the engagement (A. 17; Tr. 71-72). After contacting Phil, Jeff informed Flashner that they would not join Local 802 (A. 17; Tr. 72). She then affirmed that the job was terminated (Ibid.).

After receiving a call from Jeff which recounted the events leading to their termination at Vogue, Del Castile called Vogue. He asked to speak to the owner and was referred to Henry Cohen (A. 18; Tr. 123-125). When Castile asked why Jeff and Phil were being discontinued, Cohen replied that he had no choice because his customers were requesting the return of another group, the Dominick Santora Orchestra (A. 22 n. 47, 20; Tr. 238-240). The Santora group is composed of members of Local 802 (A. 19 n. 40; Tr. 211-212, 232-233).

The following day Castile and Charles Peterson, A.M.U.'s Treasurer, had lunch at Vogue and asked to speak to a management representative (A. 18; Tr. 128, 154-155). Sy Cohen joined them at lunch and told them Jeff and Phil could not work there until they joined Local 802 (A. 18; Tr. 129, 155-156). Cohen acknowledged that Jeff and Phil had been doing a good job, but he also reaffirmed that Vogue was a "Local 802 house". Asked whether Vogue had an agreement with Local 802 to this effect, Cohen responded that he did not know, but that it did

not make any difference (A. 18; Tr. 129, 156-159.) He also indicated that Local 802 delegates would be allowed to continue telling non-union musicians they must join in order to continue working, but that A.M.U. delegates would not be allowed past the door (A. 18; Tr. 130, 156-159).

At about 4 p.m. that afternoon Peterson, with Castile listening on an extension, called Flashner who admitted that she "pulled" Jeff and Phil because they wouldn't join Local 802 (A. 19; Tr. 131, 159-160). Flashner also stated that Local 802 had threatened to picket Vogue if Jeff and Phil were not terminated (A. 19; Tr. 132, 159-160).

B. Local 802 Exerts Pressure in Support of its
Hot Cargo Agreement with Huntington Town House

Huntington Town House (hereafter "Huntington") is a New York corporation engaged in providing ballrooms and catering services for social affairs. Banquets are served by its own staff of dining room and kitchen personnel. Although musicians are not employed directly by Huntington, each ballroom is equipped with a bandstand, piano, and other facilities suitable for a musical group. Persons desiring music at their events, however, must contract independently for that service (A. 3, 8).^{5/}

At about 8 p.m. on the evening of July 28, 1974, Del Castile^{6/} appeared with a group of musicians in Huntington's Brentwood Room to entertain a

^{5/} In a previous case, the Board found that Huntington's contracts with its patrons included a clause: "ONLY UNION MUSICIANS OF A.F. OF M. SHALL BE EMPLOYED ON THESE PREMISES -- LOCAL 802." Associated Musicians of Greater N. Y., Local 802 (Huntington Town House, Inc., 203 NLRB 1078, 1079 (1973), enforced without opinion (C.A. 2, 73-2432, September 28, 1973). This requirement is no longer expressly written into the contracts (A. 8 n. 14).

^{6/} Del Castile is the professional name of William P. Dell 'Aguila.

wedding reception (A. 9-10; Tr. 16, 26-27; 117-118). As indicated supra, p. 4, Castile is also the Administrator of the Allied Musicians Union which is a rival to Local 802 and the charging party in this case (A. 9 n. 16 Tr. 116, 139, 143). Castile's orchestra consisted of Mel Fields, ^{7/}Christopher Orlando, Tony DiPaolo, and Martin Reisman (A. 9 n. 17; Tr. 16, 17, 118).

Joseph Messina, a business representative of Local 802, visits Huntington about five times a weekend in order to determine whether a proper notice of engagement has been filed by the bandleaders for each performance; by this means the Union is able to insure that bandleaders make appropriate payments and members of Local 802 receive pension and welfare credits (A. 10, 11 n. 22; Tr. 243-244, 257, 14). About 10:20 p.m. Messina approached Castile, Fields, and Orlando when they were taking a break (A. 10; Tr. 18, 28, 119). Offering his card, Messina asked why a contract had not been filed for the performance (Ibid.). Castile took the card and responded that they were not members of the Union and, therefore, had no obligation to file a contract (A. 14, 10; Tr. 18, 28, 120). When Messina then claimed that Castile had no right to be playing there, Castile asked whether there was an agreement by which only Local 802 members could perform at Huntington. Messina replied "Yes, we have such an agreement." (Ibid.)

The conversation continued (A. 14, 10; Tr. 18-19, 28-29, 120):

Castile: "[W]ell, we're here now, what are you going to do about it?"

^{7/} Mel Fields is the professional name of Melvin Finkelstein (A. 9 fr. 17; Tr. 15).

Messina: "I'm going to let you go this time, but if you ever want to play here again, you have to be members of the Union. [T]hat's the law, in thirty days you must join or you cannot play here again."

Castile: "[I]n the event that we should return, and we are not members of your Union, what will happen?"

Messina: "[T]here would be trouble."

Castile: "[L]et me get this clear. Is this all because you and the Huntington Town House have an agreement that only Union musicians may play for any private function which takes place here."

Messina: "[Y]es, we have an agreement."

After this confrontation, Castile spoke to Huntington's banquet manager, Anthony Ciafardini (A. 11; Tr. 21, 30, 121-122). With Fields and Orlando at his side, Castile recounted the incident with Messina and asked whether it was correct that only Local 802 musicians could play there for private functions (Ibid.). Ciafardini admitted that such was the case and stated Huntington was a "union house." (Ibid.) Castile who had been a principal in a prior case involving Huntington and Local 802,^{8/} then asked again "[D]o I understand then that the Huntington Town House and Local 802 have an agreement that only their musicians may play here for private functions?" Ciafardini again responded: "[Y]es, we have an agreement" and asked if Messina had given them permission to finish the job (A. 11; Tr. 22, 30, 122-123). Castile stated that he presumed they had permission, asked whether there would be trouble if he returned with non-union musicians, and, once again, asked about

^{8/} Associated Musicians of Greater N. Y., Local 802 (Huntington Town House, Inc.), supra, 203 NLRB at 1080-1083.

Huntington's agreement with Local 802 (A. 11; Tr. 22, 30-31, 32, 123). Ciafardini directed Castile to straighten things out with the Union before coming back and, for the third time, admitted having an agreement with Local 802 that only its musicians could play at Huntington (Ibid.). Castile and his group then finished their engagement without further interruption (Ibid.).

C. Local 802 Threatens to Picket Queens Center Mall

Queens Center Merchants Association, Inc. (hereafter "the Association") is located in the Queens Center Mall in Queens, New York, and is engaged in promoting the business of its members, approximately 40 retail stores (A. 4, 22 n. 48; Tr. 54-55). Although the Mall has four shopping levels, it has only one direct entrance (A. 22 n. 48; Tr. 54-55).

The Association entered into a contract with Bob Chevy^{9/} and his orchestra to perform concerts at the Mall on four consecutive Tuesday nights beginning July 9, 1974 (A. 23; Tr. 55-56). On the afternoon of July 9, 1974, Local 802 delegate Al Brown learned of the concerts from a newspaper advertisement and called Yolanda N. Goldstein, the Association's advertising and promotion director, to find out if there were going to be union members there (A. 23, 26; Tr. 56-57, 14). Goldstein said that she neither knew nor cared and refused to disclose any information about the Chevy contract (A. 23, 26; Tr. 56-57). Brown claimed that ninety per cent of the Mall's customers were union members who would not shop there if they knew the performers were non-union (A. 23-24, 26; Tr. 57-58, 181-182). He also threatened to picket right

^{9/} Bob Chevy is the professional name of Robert Ciavolino (A. 23 n. 49; Tr. 87).

out in front of the mall if the performers were non-union (A. 24, 26; Tr. 57-58). Goldstein said she was unaware of a law that required the musicians to be union members and asked if this was a threat (A. 24, 26; Tr. 57). Brown responded that unions didn't have to threaten because they are too strong and Goldstein said she considered it a threat (Ibid.). Goldstein then called Bob Chevy's office, recounted the earlier conversation with Brown to his secretary, Josephine Spinelli, and asked for assurances that nothing would happen (A. 24; Tr. 88-89, 106-107). With Chevy listening on an extension line, Spinelli called Brown and told him that he had no right to threaten a customer (A. 24, 26; Tr. 90, 91-92, 108-109). After a brief conversation, Brown yelled that he could call anyone he wanted and hung up (A. 24, 26; 91-92, 108-109).

The concert was performed that evening without picketing or other interruption (A. 24; Tr. 109, 113). Brown and two other business representatives, Joseph Roccaforte and Basil Basile, were present at the concert and accosted Chevy at its conclusion (A. 24; Tr. 109, 93-94). Basile asked why he did not come down to the Union and straighten the whole thing out; Chevy agreed to do so (A. 24; Tr. 103, 94).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that Local 802: (a) violated Section 8(e) of the Act by maintaining and enforcing agreements, arrangements, or understandings with Vogue and Huntington under which only its musicians would be allowed to perform on their premises; and (b) violated Section 8(b)(4)(ii)(B)

by threatening, coercing, and restraining the Queens Center Merchants Association with an object of forcing it to cease doing business with Bob Chevy, a non-union band leader.^{10/}

The Board's order requires Local 802 to cease and desist from:

(a) enforcing, maintaining, or otherwise giving effect to any hot cargo agreement, arrangement, or understanding with Vogue or Huntington or any other employer; and (b) threatening, coercing, or restraining Queens Center Merchants Association or any other person where an object is to force the Association or any other person to cease doing business with Bob Chevy orchestras or any other person. Affirmatively, the order requires, in addition to the posting of the customary notices, that the notice be published on the final page of six consecutive issues of "Allegro," and that it be mailed to all catering establishments with which members of Local 802 have had engagements within the last 12 months, for posting if they are willing.^{11/}

^{10/} The Board's basis for finding a violation of Section 8(b)(4)(ii)(B) differed in minimal respect from that of the Administrative Law Judge. In finding the Union's broad threat to picket the Mall sufficient to constitute a violation, the Board found it unnecessary to consider the Administrative Law Judge's discussion of N.L.R.B. v. Fruit and Vegetable Packers (Tree Fruits), 377 U.S. 58 (1964).

^{11/} The Board's order is broader than that recommended by the Administrative Law Judge insofar as it requires publication on the final page of six consecutive issues of "Allegro" rather than one. The provision regarding the mailing of notices to the catering establishments was also added by the Board.

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT LOCAL 802 VIOLATED SECTION 8(e) OF THE ACT BY MAINTAINING AND ENFORCING AGREEMENTS OR ARRANGEMENTS WITH VOGUE AND HUNTINGTON UNDER WHICH ONLY ITS MUSICIANS WERE ABLE TO PERFORM ON THEIR PREMISES

- A. Scope of Section 8(e)

Section 8(e) of the Act makes it an unfair labor practice for a labor organization and an employer:

to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in the products or any other employer, or to cease doing business with any other person. . .

In National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 633-634 (1967), the Supreme Court explained that Section 8(e) was designed to reinforce the existing proscriptions against secondary boycotts contained in Section 8(b)(4) of the Act. All union-employer agreements having an incidental effect on other employers, however, were not prohibited. Rather, Congress intended that Section 8(e) would embody the distinction between lawful primary and unlawful secondary activity contained in Section 8(b)(4). Id. at 623-639. Thus, work preservation clauses were not made unlawful as Congress directed Section 8(e) only toward those agreements having "'secondary' objectives." Id. at 620, 623-639, 640. Accordingly, an agreement violates Section 8(e) if it is "tactically calculated to satisfy union objectives elsewhere" rather than to promote the interests of the employees already within the unit. Id. at 644-645; Houston Contractors Association v. N.L.R.B., 386 U.S. 664, 668 (1967). Accord, Carrier Air Conditioning Co. v. N.L.R.B., 547 F. 2d 1178, 1184-1185 (C.A. 2, 1976), and cases cited therein.

B. Vogue Restaurant

The situation at Vogue Restaurant presents an obvious type of Section 8(e) violation -- an agreement between Local 802 and Vogue whereby Vogue was to cease doing business with self-employed musicians such as Jeff and Phil who were not members of the Union. Such an agreement implicates Vogue, a neutral, in the Union's attempt to increase its membership generally, and as such has an unlawful secondary object. See Associated Musicians of Greater New York Local 802 (Joe Carroll Orchestras) 176 NLRB 198, 205 (1969), enforced 422 F. 2d 850 (C.A. 2, 1970).

Before the Board, the Union did not dispute that if it maintained such an agreement with Vogue, it violated Section 8(e) (A. 9), but it denied that the record established the existence of such an agreement. However, the credited testimony shows that Sy Cohen, a co-owner of Vogue and the person responsible for booking talent at the restaurant (Tr. 241), acknowledged both to Jeff and Phil and to their representatives that membership in Local 802 was required by musicians working at Vogue (A. 21, 16, 18; Tr. 66, 79, 128-129, 155-156). Further, Cohen admittedly stated to Arnold Klein, Jeff and Phil's booking agent, that he had an agreement with Local 802 to use only its musicians (A. 21, 17; Tr. 206, 42). And although Cohen claimed at the hearing that his admitted statement was nevertheless untrue (Tr. 206-207), the Board (A. 21-22) reasonably found to the contrary.

Among other things, the timing and circumstances of the termination of Jeff and Phil's engagement support an inference that the agreement referred to by Cohen was actually in effect at Vogue. Thus, although

Vogue expressed satisfaction with Jeff and Phil and stated that they "would be there for a long time" (A. 16; Tr. 64), the duo was terminated almost immediately after they confronted union agent Cole and manifested their refusal to join Local 802; moreover, the duo has never appeared at Vogue since that time (A. 17 ; Tr. 37-38, 40, 83).

Additionally, Sy Cohen admitted that he prefers that musicians performing at Vogue be members of Local 802 (Tr. 208-209, 211-212, 232-233), and as the Board found (A. 21), this admission tends to corroborate the testimony that an unlawful agreement exists. Further, the credited evidence shows that Cohen expressed fear that he would be picketed by the Union if he did not cancel Jeff and Phil's engagement (A. 21, 17; Tr. 41), and similar expressions of fear were reported to Jeff and Phil's representatives when they sought to learn the reason for the engagement's cancellation from Jeff and Phil's booking agent (A. 19, 21; Tr. 131-132, 159-160). Finally, as the Board noted (A. 21 n. 44), although there is both circumstantial and direct evidence of the existence of an illegal agreement between Vogue and Local 802, no representative from the Union appeared to deny the existence of the agreement and an adverse inference is therefore warranted.

In opposing the finding that it engaged in unlawful conduct at Vogue, as well as at the other locations discussed infra, the Union several times questioned the Administrative Law Judge's credibility resolutions. This Court has long held, however, that questions of credibility are for the trier of fact and that the Board's acceptance of credibility findings by the Administrative Law Judge will not be upset when it is based upon

"(a) his disbelief in an orally testifying witness' testimony because of the witness' demeanor or (b) the [Judge's] evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1965), citing N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (C.A. 2, 1952).

In this case, the Administrative Law Judge devoted several pages of his decision to the task of resolving the conflicts in witness testimony (A. 14-15, 20-22, 26). In so doing, he made extensive, specific credibility findings and explicitly set forth the reasoning upon which his resolutions were based. In making these decisions, he expressly considered the forthright or reluctant manner in which testimony was given, the precision or vagueness of the recollections, and the clarity or ambiguity in the presentation. Additionally, he weighed the failures to make direct responses to questions, the disinterested positions of various witnesses, and corroboration or contradictory nature of the statements. Thus, his evaluations were based on a meticulous analysis of all the evidence, including assessment of the consistency of the testimony, as well as personal observation of the demeanor of the witnesses. As this Court has held, in such circumstances the Administrative Law Judge's credibility resolutions are entitled to particular weight. See MPC Restaurant Corp. v. N.L.R.B., 481 F. 2d 75, 77 (C.A. 2, 1973).

In opposing the finding that it engaged in unlawful conduct at Vogue, the Union also relied heavily on evidence that non-union bands have performed

at Vogue without being challenged (A. 22 n. 47, 19 n. 40; Tr. 209, 230-231). However, as the Board suggested in a prior case where similar evidence was presented, what is decisive is not that there may be exceptions to the rule, but that the rule exists at all. See Associated Musicians of Greater N.Y., Local 802 (Huntington Town House, Inc.), supra, 203 NLRB at 1083. Here, as the Board found (A. 22 n. 47), although there is evidence that the unlawful agreement was not uniformly enforced, the credited evidence shows^{12/} that it was enforced against Jeff and Phil.

C. Huntington Town House

As indicated in the Statement, p. 6, in a prior case involving Huntington and the Union, the Board found that the parties violated Section 8(e) of the Act by maintaining and enforcing an agreement whereby only Local 802 musicians could be employed on Huntington's premises. Associated Musicians of Greater N.Y., Local 802, 203 NLRB 1078 (1973), enforced without

^{12/} Before the Board, the Union also objected to the Administrative Law Judge's sua sponte finding that Jeff and Phil were "persons" within the meaning of Section 2(1) and 8(b)(4) of the Act because such jurisdictional allegations were not set forth in the complaint. Board complaints need not conform to the technicalities of common law pleadings. Bakery Wagon Drivers & Salesmen, Local 484 v. N.L.R.B., 321 F. 2d 353, 356 (C.A.D.C., 1963). Indeed, the Board may even have an obligation to decide material issues which have been fairly tried by the parties even though they have not been specifically pleaded. See REA Trucking Co. v. N.L.R.B., 439 F. 2d 1065, 1066 (C.A. 9, 1971). Here, as the Administrative Law Judge indicated (A. 6), the record establishes both that Jeff and Phil were self-employed persons (Tr. 62-63, 213) and that their status was not disputed by the parties at the hearing. Accordingly, the omission of a specific complaint allegation was merely "inadvertent error corrected by the record" (id.), and the Union was not prejudiced thereby.

opinion (C.A. 2, 73-2432, September 28, 1973).^{13/} In the prior case the existence of this unlawful agreement was established in part by documentary evidence that Huntington's contracts with its patrons specified that only Local 802 musicians could be employed (203 NLRB at 1079, 1082). However, the Board also relied on testimony establishing that representatives of Huntington and the Union had orally apprised non-union musicians of the existence of such an agreement (203 NLRB at 1082). Del Castile was a principal in this prior case. He elicited damaging admissions from both Huntington and the Union, and the Board found that one of Huntington's managers threatened to throw him off the premises if he attempted to perform again at Huntington (203 NLRB at 1080-1081, 1082).

In the present case it is undisputed that Huntington no longer has a written agreement obliging its patrons to hire only musicians from the Union. However, as shown in the Statement, pp. 6-9, Del Castile's reappearance at Huntington, about a year after the prior case, precipitated the disclosure that Huntington and the Union still maintain an unlawful agreement in an unwritten form. Thus, the credited testimony establishes that Local 802 Business Representative Messina specifically advised Castile of the existence of such an agreement, asserted that Castile had no right to be performing at Huntington, and threatened that there would be "trouble" if Castile attempted to perform there again (supra, pp. 7-8). Further, Huntington's banquet manager,

^{13/} On February 18, 1977, pursuant to a stipulation executed by the Board and the Union, the Court found that the Union was in contempt of the judgment entered on September 28, 1973.

Anthony Ciafardini, confirmed the existence of the agreement and directed Castile to straighten things out with the Union before coming back (supra, p. 8-9). Castile has not been engaged to perform at Huntington since that time (A. 11; Tr. 316).

Contrary to the Union's contention before the Board, the evidence that non-union bands have performed at Huntington without challenge (A. 13 n. 26, 15) does not vitiate the finding that an unlawful agreement exists and that the Union seeks to enforce it against Castile. There were similar instances of non-enforcement of the agreement in the prior case (203 NLRB at 1082-1083). Moreover, as already indicated with respect to a similar argument concerning the agreement at Vogue (supra, p. 15-16), the decisive issue is not whether there are exceptions but whether there is credible evidence of an attempt to enforce an unlawful agreement. For as the Board indicated (A. 14), nothing in Section 8(e) requires that an unlawful agreement be enforced on a universal or non-discriminatory basis.^{14/}

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE
SUPPORTS THE BOARD'S FINDING THAT LOCAL 802
VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT BY
THREATENING TO PICKET THE QUEENS CENTER MALL

Section 8(b)(4) of the Act provides that it is an unfair labor practice for a union:

(ii) to threaten, coerce, or restrain any person
in commerce or in an industry affecting commerce,
where . . . an object thereof is

^{14/} Insofar as that the Union's defense is predicated on a challenge to the Administrative Law Judge's credibility resolutions, we have already shown supra, pp. 14-15, that this defense is without merit.

(B) forcing or requiring any person . . . to cease doing business with any other person

Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

These provisions reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675, 692 (1951). Whether a union's threat has an improper object is a question of fact for the Board whose decision is conclusive if supported by substantial evidence. N.L.R.B. v. Denver Building Trades Council, supra, 341 U.S. at 691-692 (1951); Bedding Workers, Local 140 v. N.L.R.B., 390 F. 2d 435, 499-500 (C.A. 2, 1968), cert. denied, 392 U.S. 905.

As shown in the Statement, pp. 9-10, an association of merchants at Queens Center Mall engaged Bob Chevy and his orchestra to perform a series of four evening concerts. On the afternoon of the first concert, Local 802 representative Al Brown called the merchants association, and, according to the credited testimony, Brown threatened to put up a picket line on Queens Boulevard -- where the Mall's only direct entrance is located -- if the concert were performed by non-union musicians.

On these facts the Board was fully warranted in concluding that the Union brought unlawful secondary pressure to bear on the Association in an attempt to force it to cease doing business with Bob Chevy, the primary employer.

For the Union expressed no interest in confining its picketing to the primary, Chevy and his orchestra. Rather, as the Board found, the Union's threat, by its breadth, "contemplated picketing of the entire shopping center and any employer, person, or individual working or employed there without regard to their connections with the primary" (A. 39 n. 1). In enacting Section 8(b)(4)(ii)(B) of the Act in 1959, Congress specifically sought to protect neutral employers from threats of labor trouble or other consequences which were designed to force them to cease doing business with the primary. See N.L.R.B. v. Highway Truckdrivers & Helpers, Local 107, 300 F. 2d 317, 321 (C.A. 3, 1962), discussing the pertinent legislative history. See also Carrier Air Conditioning Co. v. N.L.R.B., supra, 547 F.2d at 1191-1192. Accordingly, the Board properly found that the Union's threat to picket the Mall violated Section 8(b)(4)(ii)(B).

III. THE BOARD'S ORDER WAS A PROPER
REMEDY IN THIS CASE

This case represents a further chapter in Local 802's continuing efforts to exclude non-members from performing within its jurisdiction. ^{15/}

^{15/} See Associated Musicians of Greater N.Y., Local 802 (Huntington Town House, Inc.), supra, 203 NLRB 1078 (1973), enforced without opinion (C.A. 2, 73-2432, September 28, 1973), civil contempt adjudication entered, pursuant to stipulation, February 18, 1977 (violations of 8(e), 8(b)(4)(ii)(A) and (B); N.L.R.B. v. Associated Musicians of Greater New York, Local 802 (National Association of Orchestra Leaders) 422 F. 2d 850, (C.A. 2, 1970) (violations of 8(b)(4)(i) and (ii)(A)); Associated Musicians of Greater New York, Local 802 (Random Travel, Inc.), 171 NLRB 1106 (1968) (violations of 8(b)(4)(i) and (ii)(A) and (B)). See also, N.L.R.B. v. Associated Musicians of Greater New York, Local 802, 226 F. 2d 900 (C.A. 2, 1955), cert. denied, 351 U.S. 962 (violation of 8(b)(4)(A)).

Both the Administrative Law Judge, in recommending a broad remedial order, and the Board, in broadening that recommended order even further, expressly relied on Local 802's proclivity to violate the Act in the same or similar respects. (A. 39 n. 2, 34).

Section 10(c) of the Act empowers the Board to devise appropriate remedies which will effectuate the policies of the Act. N.L.R.B. v. Food Store Employers, Local 347, 417 U.S. 1, 8 (1974); Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 176 (1973). Congress has recognized the Board's special expertise and given it broad discretion in the selection of remedies. Fibreboard Paper Prods. Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964). We show below that the Board properly exercised its discretion here.

Initially, the Board properly issued an order which restrains Local 802 from violating the Act in like or similar fashion not only with regard to Vogue, Huntington, and the Queens Center, but also with regard to "any other employer" and "any other person" (A. 34-35). In an earlier case against Local 802, this Court recognized the Union's tendency to violate the Act and enforced a similar broad order. N.L.R.B. v. Associated Musicians of Greater New York, Local 802, 422 F.2d 850, 851 (C.A. 2, 1970). In so doing, this Court held (Id. at 851-852):

The Board's broad order restraining other violations, based on this record, is justifiable because those other violations "bear some resemblance to that which the [respondent] has committed or that the danger of their commission in the future is to be anticipated from the course of [respondent's] conduct in the past." N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 437 (1941).

See also, N.L.R.B. v. Local 445, I.U.E., 529 F. 2d 502, 505 (C.A. 2, 1976). Certainly, if Local 802's conduct then was sufficient to justify a broad cease and desist order, the interim violations serve only to reinforce the necessity of issuing a broad order here. See also N.L.R.B. v. Local 294, I.B.T., 284 F. 2d 887, 893 (C.A. 2, 1960); N.L.R.B. v. Local 282 I.B.T., 344 F. 2d 649, 652-653 (C.A. 2, 1965), enforcing broad orders.

The Board's order (A. 40) requiring Local 802 to publish notices in six consecutive issues of "Allegro" is also justified. This Court has already enforced an order requiring Local 802 to publish in one issue of "Allegro." 422 F. 2d 850, supra. Similarly, in the Random Travel, Inc., case, supra, Local 802 was previously required to publish in 3 issues (171 NLRB at 1107). This Court has upheld a Board order requiring a union to mail notices to all its members. N.L.R.B. v. Local 294, IBT, 470 F. 2d 57, 63-64 (C. A. 2, 1972). Clearly, the publication requirement is intended to reach all the members and it is no more onerous than a mailing requirement.

Finally, the Board (A. 40) properly ordered Local 802 to mail notices to all catering establishments with whom its members have had engagements within the last twelve months, for posting if they are willing. This Court has long held that "the Board has a duty in a litigated case to employ broader and more stringent remedies against a recidivist than those usually invoked against a first offender, particularly where normal remedies have proved to be ineffective after earlier proceedings." Containair Systems Corp. v. N.L.R.B., 521 F. 2d 1166, 1171 (C.A. 2, 1975).

Here, the mailing of notices to the likely targets of Local 802's coercive activity is clearly designed to put such persons on notice that the Union's coercion is unlawful. Thus, it will be more difficult for Local 802 to carry on its illegal coercion in the future. Certainly, this is the kind of "more stringent and imaginative orders" that this Court had in mind in Containair, supra, 521 F. 2d 1166, 1171.

In sum, the Board's broad order here is necessary and proper and should not be disturbed since it cannot be shown that the order "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric and Power Co. v. N.L.R.B., 319 U.S. 533, 540 (1941); N.L.R.B. v. Local 294, I.B.T., supra, 470 F. 2d at 63.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court enter a judgment enforcing the Board's order in full.

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March 30, 1977.

NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

v. : No. 77-4021

ASSOCIATED MUSICIANS OF GREATER :

NEW YORK, LOCAL 802, :

Respondent. :

The undersigned hereby certifies that two copies of the Board's brief in the above-captioned case, have this day been served upon the following counsel at the address listed below:

Elliott Moore (N.F.)
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Dated at Washington, D.C.
this 30th day of March, 1977.